

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	Crim. No. 08-00542 HG-01
)	
)	
Plaintiff,)	
)	
vs.)	
)	
KATO AMOSA IOSUA,)	
)	
)	
Defendant.)	
)	

**ORDER GRANTING DEFENDANT'S MOTION FOR EXTENSION OF TIME TO FILE A
NOTICE OF APPEAL (ECF No. 71)**

Defendant Kato Amosa Iosua, proceeding pro se, has filed a "Motion for Extension of Time to File a Notice of Appeal" pursuant to Federal Rule of Appellate Procedure 4(b)(4). The Court finds Defendant has established excusable neglect for the three-day delay in filing his Notice of Appeal.

Defendant's MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL (ECF No. 71) is **GRANTED**.

PROCEDURAL HISTORY

On June 26, 2015, the District Court issued an ORDER DENYING DEFENDANT'S MOTION FOR MODIFICATION OF SENTENCE. (ECF No. 65).

Seventeen days later, on July 13, 2015, Defendant filed a Notice of Appeal from the District Court's Order Denying his

Motion for Modification of Sentence. (ECF No. 66).

On July 22, 2015, the Ninth Circuit Court of Appeals issued an Order stating, “[b]ecause the notice of appeal was filed more than 14 days after entry of the order, [Defendant’s Notice of Appeal] was not timely under Federal Rule of Appellate Procedure 4(b)(1)(A).” (ECF No. 69). The appellate court remanded proceedings to the District Court for “the limited purpose of permitting the district court to provide appellate notice and an opportunity to request that the time for filing the notice of appeal be extended.” (Id.)

On July 27, 2015, the Court issued a Minute Order providing Defendant with notice and the opportunity to file a Motion for Extension of Time to File a Notice of Appeal. (ECF No. 70).

On August 6, 2015, Defendant filed a MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL. (ECF No. 71).

ANALYSIS

Pursuant to Federal Rule of Appellate Procedure 4(b)(4), the district court may grant an extension of time to file a notice of appeal upon a finding of excusable neglect or good cause.

Federal Rule of Appellate Procedure(4)(b)(4) states:

Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

Fed. R. App. P. 4(b)(4).

The district court has jurisdiction to consider Defendant Iosua's Motion for Extension of Time because his Notice of Appeal was filed within thirty days after the 14-day deadline to file his appeal. *Id.*; *United States v. Stolarz*, 547 F.2d 108, 112 n.5 (9th Cir. 1976).

The district court evaluates "excusable neglect" by considering four factors:

- (1) the danger of prejudice to the non-moving party;
- (2) the length of delay and its potential impact on judicial proceedings;
- (3) the reason for the delay, including whether it was within the reasonable control of the movant; and,
- (4) whether the moving party's conduct was in good faith.

Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004) (*en banc*) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395 (1993)).

The United States Supreme Court requires courts to consider the unique situation of pro se prisoners when evaluating the timeliness of their appeals. *Houston v. Lack*, 487 U.S. 266, 270 (1988). The Supreme Court has explained that "[s]uch prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the clerk of court receives and stamps their notices of appeal before

the ... deadline." Id. at 270-71.

The Ninth Circuit Court of Appeals has found that an extension of time should be granted to a pro se prisoner who has "done all he could do under the circumstances" to file a timely notice of appeal. United States v. Houser, 804 F.2d 565, 569 (9th Cir. 1986).

Here, Defendant is a pro se prisoner and his Notice of Appeal was filed three days late. Defendant asserts the delay in filing his Notice of Appeal was caused by his misreading of the Federal Rules of Appellate Procedure. (Def.'s Motion at p. 2, ECF No. 71). Defendant states he was not advised of the limitations period for filing his appeal and was unclear if his appeal was subject to the thirty-day deadline for civil appeals set forth in Fed. R. App. P. 4(a) or the fourteen-day deadline for criminal appeals set forth in Fed. R. App. P. 4(b).

The Court finds that Defendant Iosua has established excusable neglect for the three-day delay in filing his Notice of Appeal. The short delay does not appear to have prejudiced the Government or negatively impacted the judicial proceedings.

Defendant provided a reasonable explanation for his delay in filing his Notice of Appeal. The Ninth Circuit Court of Appeals has recognized that pro se prisoners have had difficulty in determining if an appeal from an order denying a motion brought pursuant to 18 U.S.C. § 3582(c)(2) is subject to Fed. R. App. P.

4(a) or 4(b). United States v. Ono, 72 F.3d 101, 102 (9th Cir. 1995).

There is no evidence that Defendant Iosua's delay in filing his Notice of Appeal was caused by his own bad faith.

Defendant's Motion for Extension of Time to File a Notice of Appeal (ECF No. 71) is **GRANTED**.

Defendant's Notice of Appeal filed on July 13, 2015 (ECF No. 66) is deemed timely based on a finding of excusable neglect.

CONCLUSION

Defendant's MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL (ECF No. 71) is **GRANTED**.

Defendant's Notice of Appeal (ECF No. 66) is deemed timely.

The Clerk of Court is directed to provide a copy of this Order to the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 24, 2015.



/s/ Helen Gillmor

Helen Gillmor
United States District Judge

United States v. Kato Amosa Iosua, Crim. No. 08-00542 HG-01;
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